TEKUN NASIONAL v. PLENITUDE DRIVE (M) SDN BHD & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
MOHD ZAWAWI SALLEH FCJ
HASNAH MOHAMMED HASHIM FCJ
[CIVIL APPEAL NOS: 02(f)-90-10-2018(W)
& 02(f)-92-10-2018(W)]
10 SEPTEMBER 2021

CONTRACT: *Agreement – Termination – Whether unilateral termination amounted to breach of agreement – Assessment of damages – Clause in agreement providing formula for computation of damages – Whether proportionate to legitimate interest of innocent party – Whether damages claimed reasonable – Whether reflected opportunity loss for unexpired term of agreement – Whether exorbitant amount regarded as 'penalty' – Whether rendered clause void – Whether claim for damages justified*

JURISDICTION: *Courts – High Court – Residual jurisdiction of High Court – Assessment of damages – Order for assessment of damages despite concluding evidence insufficient – Whether amounted to misdirection – Whether High Court ought to dismiss claim in absence of evidence in support*

The two appeals herein, the MG appeal and SI appeal, concerned the application of s. 75 of the Contracts Act 1950 ('CA') in relation to the assessment of damages arising out of a termination of an agreement. Tekun Nasional ('Tekun'), as an agency under the Ministry of Entrepreneur Development, established to provide simple and quick financing facilities to Bumiputeras to kick-start and further expand their businesses, disburses loans and collects the repayments. Pursuant to a proposal by Plenitude Drive Sdn Bhd ('Plenitude') to develop an efficient information infrastructure system which will upgrade the loan repayment facility by introducing the MG and SI system, Tekun awarded the project to Plenitude. The MG system will be used for collection of repayment from Tekun's borrowers by using an ATM card *via* e-debit transactions, whilst the SI system was a separate software system integrating with Maybank's system to collect monthly repayments by direct debit from the accounts of the Tekun's borrowers. The implementation was to be carried out in phases, the first phase being the Tekun MG system. An agreement was executed between the parties setting out the terms and conditions, amongst others, that Plenitude was to supply at a minimum number of 500 mobile gadgets for Tekun's use throughout Malaysia as well as providing all relevant technical services. Plenitude completed the development of the MG system and a user acceptance test was conducted. Tekun approved and accepted the MG system, following which, a total of 28 MG was delivered to Tekun's branches located in the Federal

A Territory. The remaining 472 MG plus another 181 additional MG had been checked and verified by Tekun and were ready to be delivered to all its branches throughout the country. However, Tekun subsequently refused to collect the remaining mobile gadgets, and instead, ordered all of its officers in the Federal Territory to stop using the MG, failed to pay invoices issued B by Plenitude, refused to continue with the MG system and blocked Plenitude's access to its database and system. Aggrieved, Plenitude issued notices to Tekun to rectify the breach. Upon Tekun's failure to rectify the breach at the expiry of the notice period, Plenitude issued a notice to terminate the agreement and demanded the sum of RM29,829,132.40 as C damages, computed based on the formula provided under cl. 11.2 of the agreement. Plenitude subsequently filed two suits against Tekun for breach and the wrongful repudiation of the agreement by Tekun, ie: (i) a claim for RM29,829,132.40 and other reliefs, including a claim for general damages for breach of contract and aggravated damages; and (ii) a claim for RM612,000 for installing and commissioning the MG system. It was D Plenitude's case that it had delivered 28 mobile gadgets to Tekun and despite having fulfilled its obligation under the agreement, Tekun refused and failed to give any instructions or consent to Plenitude to complete the delivery of the remaining 472 mobile gadgets as provided under the agreement. With regards to the SI system, Plenitude contended that the quotation of E RM612,000 to complete the project was accepted and agreed to by Tekun. The SI system was tested and after being accepted and approved, the project went 'live', but Tekun failed to make payment of the quoted amount. Tekun, on the other hand, contended that it was directed by the Ministry to terminate the agreement and that the project was being investigated by the F Malaysian Anti-Corruption Commission. It was also alleged that the Managing Director/Chief Executive Officer of Tekun purportedly was not authorised to enter into the agreement as the amount involved was in excess of RM500,000 and as such, the approval of the board of trustees must be procured before entering into any agreement.

G The High Court Judge ('HCJ') found that there was strong credible evidence of acquiescence by Tekun that there was a valid contract for the MG system project. The High Court allowed Plenitude's claim on liability and dismissed the stipulated damages RM29,829,132.40, holding that the claim was for special damages based on the formula under cl. 11.2 of the agreement. The H High Court held that Plenitude was not entitled to claim the specific contract sum in light of s. 75 of the CA, but was entitled to general damages to be assessed. In respect of the SI system, Tekun was estopped from reneging on their obligation to pay under the invoice and judgment was entered against Tekun in the sum of RM612,000. The Court of Appeal affirmed the findings I of the HCJ in relation to the SI appeal whereas, in relation to the MG appeal, the Court of Appeal found that there was no appealable error of law or fact in the findings of liability. Hence, this appeal. Pursuant to a preliminary objection raised by Plenitude and subsequent amendments to the notice of

appeal by Tekun, the SI Appeal was struck out. This court granted leave to appeal the following questions of law: (i) whether the High Court, in a trial on both liability and damages for breach of contract, has any residual jurisdiction to order for assessment of damages, after it has delivered judgment and held that the plaintiff has failed to prove the damages at the trial; and (ii) (a) whether a litigant who wishes to rely on s. 75 of the CA must raise it in the pleadings; and (b) whether a litigant who wishes to rely on s. 75 of the CA to defeat a claim based on a contractual provision fixing a formula for computation of the amount of damages must prove that the provision is a penalty.

Held (allowing appeal in part with costs; affirming decision of Court of Appeal on issue of liability and varying order for damages to be assessed and substituting with an order for nominal damages)
Per Hasnah Mohammed Hashim FCJ delivering the judgment of the court:

(1) For a decision to be binding retrospectively, the case must still be at the trial stage to enable the parties to prepare and argue their case, be it a plaintiff or defendant, based on the burden of proof applicable at that material time. Under the doctrine of 'prospective overruling', the law declared by the court applies to cases arising in future only and its applicability to cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. The emphasis is on future cases and it does not affect cases that have attained finality which could can only be confined to cases that has already exhausted their appeal process within the court system. (paras 32-34)

(2) Pre-*Cubic Electronics Sdn Bhd (in liquidation) v. Mars Telecommunications Sdn Bhd* ('*Cubic*'), in applying s. 75 of the CA, the burden of proof lies on the plaintiff to show that the damages as stipulated in the contract is a reasonable compensation by reference to the loss sustained by the plaintiff in consequence of the defendant's breach. In determining the reasonableness of the amount, the court must give due regard to the evidence of actual loss adduced by the plaintiff. This burden of proof upon the plaintiff as the claimant is consistent with the classic juridical principle stating that 'he who asserts must prove'. However, *Cubic* introduced a new burden, shifting the onus to the defendant, in this case, Tekun, to prove that the damages claimed by Plenitude was unreasonable and unconscionable. (paras 35 & 37)

(3) *Cubic* should not be applicable retrospectively to cases where full trial has completed and has been decided by the court of first instance. *Cubic* was decided by the FC two years after the High Court's decision of this case. Whereas, the Court of Appeal, which also considered and decided the appeal before *Cubic*, relied on the earlier legal position on the

application of s. 75A. In this case, the retrospectivity of *Cubic* would cause manifest injustice to Tekun. Therefore, it stands to reason that *Cubic* would only apply prospectively. (paras 26 & 38)

(4) The conduct of Tekun in unilaterally suspending the MG system allegedly because they wanted to conduct a review as to its feasibility as well as to obtain its board of trustees' approval was in fact a façade or cloak to re-negotiate the monetary terms of the agreement. The actions of Tekun tantamount to conduct which was repudiatory of the agreement and the conduct of Tekun before the issuance of the Plenitude's notice of termination was an absolute refusal by Tekun to perform their obligations under the agreement. The unilateral act of suspending the MG system amounted to a breach of the agreement. The termination by Tekun pursuant to the direction given by the Government was ineffective as the agreement had already been terminated by Plenitude. There was no evidence that Plenitude had any knowledge of any irregularity in the internal management of Tekun including the policy that any transaction above the value of RM500,000 required the approval of the board of trustees. (paras 41 & 42)

(5) When there is a clause on damages, the court must evaluate the reasonableness of the clause in question. What is 'reasonable' must naturally be based on the available evidence. Clause 11.2 of the agreement was explicit, in that, it provided that if the agreement is unilaterally terminated by either party during the subsistence of the agreement, the defaulting party shall pay compensation to the other party reflecting to that party's opportunity loss of income for the unexpired term of the agreement. The court must evaluate the clause against the available evidence to ascertain whether the amount calculated based on the clause is proportionate to the legitimate interest of the innocent party in the performance of the primary obligation. If the amount stipulated in the clause is exorbitant, then the clause must be regarded as an unreasonable 'penalty clause' and is therefore, void. (paras 47, 54 & 56)

(6) The party claiming damages, special or general, bears the burden of proving the fact and quantum of damages suffered. The award for damages is compensatory in nature, and as such, the burden of proving damages or loss lies with the plaintiff. The formula under cl. 11.2 requires a calculation of Plenitude's opportunity loss which is defined as the party's entitlement in accordance with cl. 5.1. As a party who had suffered loss or damages as a result of the breach by Tekun, Plenitude would be entitled to be compensated. However, there was no evidence of damages, whether oral or documentary, proven by Plenitude to justify the claim for damages based on the agreed formula. Furthermore, under

cl. 11.2 of the agreement, the right can only be invoked if the agreement runs for 12 months. In this case, the agreement was terminated by Plenitude in less than 12 months and therefore, the formula as stipulated under cl. 11.2 could not be invoked. (paras 66-68)

(7) If a sum named in a contract is exorbitant and unreasonable for it to be paid in case of a breach, it must be treated as a penalty and is therefore, void under s. 75 of the CA. Clause 11.2 appeared to be a penalty clause under s. 75 of the CA. The HCJ should have dismissed the stipulated amount since there was no evidence adduced to support the amount or any amount to be decided by the court. In ordering damages to be assessed after having concluded that Plenitude failed to adduce sufficient evidence to sustain its case on the quantum of damages, the HCJ had misdirected himself. In the circumstances, although Tekun was liable for damages suffered by Plenitude, since Plenitude failed to prove damages, the court allowed nominal damages. (paras 71-73)

Bahasa Melayu *Headnotes*

Dua rayuan ini, rayuan MG dan SI, berkaitan dengan penggunaan s. 75 Akta Kontrak 1950 ('Akta') berkaitan dengan taksiran ganti rugi yang timbul daripada penamatan perjanjian. Tekun Nasional ('Tekun'), sebagai sebuah agensi bawah Kementerian Pembangunan Usahawan, ditubuhkan untuk memberi kemudahan kewangan mudah dan cepat kepada Bumiputera untuk memulakan dan mengembangkan perniagaan mereka, memberi pinjaman kewangan dan mengutip bayaran balik. Menurut satu cadangan oleh Plenitude Drive Sdn Bhd ('Plenitude') untuk mengembangkan sistem infrastruktur maklumat yang cekap yang akan meningkatkan kemudahan pembayaran balik hutang dengan memperkenalkan sistem MG dan SI, Tekun mengawardkan projek tersebut pada Plenitude. Sistem MG akan digunakan untuk mengutip bayaran daripada peminjam-peminjam Tekun menggunakan kad ATM melalui transaksi e-debit, sementara sistem SI adalah sistem perisian berasingan yang berintegrasi dengan sistem Maybank untuk mengutip bayaran balik bulanan melalui debit terus daripada akaun peminjam-peminjam Tekun. Pelaksanaan sepatutnya dibuat secara berperingkat, peringkat pertama adalah sistem MG Tekun. Satu perjanjian dimeterai antara pihak-pihak dengan menyenaraikan terma-terma dan syarat-syarat, antara lain, bahawa Plenitude perlu membekalkan jumlah minimum 500 alat mudah alih untuk kegunaan Tekun di seluruh Malaysia dan juga memberi kesemua perkhidmatan teknikal yang relevan. Plenitude menyelesaikan pembangunan sistem MG dan ujian penerimaan pengguna dijalankan. Tekun meluluskan dan menerima sistem MG, berikutan itu, sejumlah 28 MG diserahkan kepada cabang Tekun yang terletak di Wilayah Persekutuan. Baki 472 lebih MG dan tambahan 181 MG telah diperiksa dan disahkan oleh Tekun dan sedia untuk diserahkan kepada kesemua cabangnya di seluruh negara. Walau bagaimanapun, Tekun kemudiannya enggan

A mengambil baki alat mudah alih itu, dan sebaliknya, mengarahkan kesemua pegawai-pegawainya di Wilayah Persekutuan menghentikan penggunaan MG, gagal membayar invois-invois yang dikeluarkan Plenitude, enggan meneruskan dengan sistem MG dan menghalang akses Plenitude pada pengkalan datanya dan sistemnya. Terkilan, Plenitude mengeluarkan notis
B untuk Tekun membetulkan pelanggaran tersebut. Atas kegagalan Tekun membetulkan pelanggaran apabila tempoh notis luput, Plenitude mengeluarkan notis penamatan perjanjian dan menuntut sejumlah RM29,829,132.40 sebagai ganti rugi, yang dikira berdasarkan formula yang diperuntukkan bawah kl. 11.2 perjanjian. Plenitude kemudian memfailkan
C dua tindakan terhadap Tekun untuk pelanggaran dan penamatan salah perjanjian oleh Tekun, iaitu: (i) tuntutan untuk RM29,829,132.40 dan relief-relief lain, termasuk tuntutan untuk ganti rugi am untuk pelanggaran kontrak dan ganti rugi teruk; dan (ii) tuntutan untuk RM612,000 untuk pemasangan dan pentauliahan sistem MG. Kes Plenitude adalah bahawa Plenitude telah
D menyerahkan 28 alat mudah alih kepada Tekun dan walaupun telah memenuhi tanggungjawabnya bawah perjanjian tersebut, Tekun enggan dan gagal memberi apa-apa arahan atau persetujuan untuk Plenitude menyelesaikan penyerahan baki 472 alat mudah alih seperti yang diperuntukkan bawah perjanjian. Berkaitan dengan sistem SI, Plenitude menghujahkan bahawa sebut harga RM612,000 untuk melengkapkan projek
E itu diterima dan disetujui Tekun. Sistem SI diuji dan setelah diterima dan diluluskan, projek itu telah berlangsung, tetapi Tekun gagal membuat bayaran jumlah yang disebut. Sebaliknya, Tekun menghujahkan bahawa ini diarahkan oleh Kementerian untuk menamatkan perjanjian dan projek tersebut sedang disiasat oleh Suruhanjaya Pencegahan Rasuah Malaysia.
F Didakwa juga bahawa Pengarah Urusan/Ketua Pegawai Eksekutif Tekun tidak diberi kuasa untuk memasuki perjanjian kerana jumlah yang terlibat melebihi RM500,000 dan oleh itu, kelulusan lembaga pemegang amanah mesti diperoleh sebelum memasuki apa-apa perjanjian.

Hakim Mahkamah Tinggi ('HMT') mendapati keterangan boleh percaya
G yang kukuh berkaitan persetujuan Tekun bahawa terdapat kontrak sah untuk projek sistem MG. Mahkamah Tinggi membenarkan tuntutan Plenitude atas liabiliti dan menolak ganti rugi RM29,829,132.40 yang dinyatakan, memutuskan bahawa tuntutan tersebut adalah untuk ganti rugi khas berdasarkan formula bawah kl. 11.2 perjanjian. Mahkamah Tinggi
H memutuskan bahawa Plenitude tidak berhak menuntut jumlah spesifik berdasarkan s. 75 Akta, tetapi berhak untuk ganti rugi am yang ditaksir. Berkaitan dengan sistem SI, Tekun diestop daripada memungkiri tanggungjawabnya untuk membayar invois dan penghakiman dimasukkan menentang Tekun dalam jumlah RM612,000. Mahkamah Rayuan
I mengesahkan dapatan HMT berkaitan rayuan SI manakala, berkaitan dengan rayuan MG, Mahkamah Rayuan mendapati tiada kekhilafan undang-undang atau fakta yang boleh dirayu dalam dapatan berkenaan liabiliti. Oleh itu, rayuan ini. Berikutan bantahan awalan yang dibangkitkan oleh Plenitude dan

pindaan terkemudian pada notis rayuan oleh Tekun, rayuan SI dibatalkan. Mahkamah ini memberi kebenaran merayu atas soalan-soalan undang-undang berikut: (i) sama ada Mahkamah Tinggi, dalam perbicaraan berkaitan kedua-dua liabiliti dan ganti rugi untuk pelanggaran kontrak, mempunyai apa-apa bidang kuasa lebihan untuk memerintahkan pentaksiran ganti rugi, selepas menyampaikan penghakiman dan memutuskan plaintif gagal membuktikan kerugian dalam perbicaraan; dan (ii) (a) sama ada seorang litigan yang berniat untuk bersandar pada s. 75 Akta mesti membangkitkannya dalam pliding; dan (b) sama ada seorang litigan yang berniat untuk menyandar pada s. 75 Akta untuk mematahkan tuntutan berdasarkan peruntukan kontrak menetapkan formula untuk pengiraan jumlah kerugian mesti membuktikan bahawa peruntukan itu bersifat menghukum.

Diputuskan (membenarkan sebahagian rayuan dengan kos; mengesahkan keputusan Mahkamah Rayuan berkenaan isu liabiliti dan mengubah perintah untuk ganti rugi ditaksir dan menggantikannya dengan perintah untuk ganti rugi nominal)
Oleh Hasnah Mohammed Hashim HMP menyampaikan penghakiman mahkamah:

(1) Agar keputusan mengikat secara retrospektif, kes tersebut mesti berada di peringkat perbicaraan untuk membolehkan pihak-pihak bersedia dan menghujah kes mereka, sama ada plaintif atau defendan, berdasarkan beban pembuktian yang terpakai pada masa material. Bawah doktrin 'prospective overruling' undang-undang yang diisytiharkan oleh mahkamah diguna pakai pada kes-kes yang hanya berbangkit pada masa hadapan dan pemakaiannya dalam kes-kes yang telah dimuktamadkan, adalah dikecualikan kerana pembatalannya akan sebaliknya mengakibatkan kesulitan pada sesiapa yang meletakkan kepercayaan terhadap kewujudannya. Penekanan adalah pada kes-kes masa hadapan dan itu tidak menjejaskan kes-kes yang telah dimuktamadkan yang hanya terhad pada kes-kes yang telah melalui proses rayuan dalam ruang litup sistem mahkamah.

(2) Sebelum *Cubic Electronics Sdn Bhd (in liquidation) v. Mars Telecommunications Sdn Bhd* ('*Cubic*'), apabila menggunakan s. 75 Akta, beban pembuktian terletak pada plaintif untuk menunjukkan bahawa ganti rugi yang dinyatakan dalam kontrak adalah pampasan munasabah dengan merujuk pada kerugian yang dialami plaintif akibat pelanggaran defendan. Apabila memutuskan kemunasabahan jumlah tersebut, mahkamah mesti memberi pertimbangan wajar pada keterangan kerugian sebenar yang dikemukakan oleh plaintif. Beban pembuktian ini pada plaintif sebagai penuntut adalah konsisten dengan prinsip kehakiman klasik yang menyatakan bahawa 'orang yang menyatakan perlu membuktikan'. Walau bagaimanapun, *Cubic* memperkenalkan beban baharu,

mengalihkan beban tersebut pada defendan, dalam kes ini, Tekun, untuk membuktikan bahawa ganti rugi yang dipohon oleh Plenitude tidak munasabah dan tidak berpatutan.

(3) *Cubic* tidak wajar digunakan secara retrospektif pada kes-kes yang telah selesai dibicarakan dan diputuskan mahkamah peringkat awal. *Cubic* diputuskan oleh MP dua tahun selepas keputusan Mahkamah Tinggi dalam kes ini. Manakala, Mahkamah Rayuan, yang juga mempertimbangkan dan memutuskan rayuan sebelum *Cubic*, bersandar pada kedudukan undang-undang sebelumnya berkaitan pemakaian s. 75A. Dalam kes ini, penggunaan *Cubic* secara retrospektif akan mengakibatkan ketidakadilan pada Tekun. Oleh itu, wajar bahawa *Cubic* akan terpakai secara prospektif.

(4) Tindakan Tekun menggantung secara sebelah pihak sistem MG yang dikatakan kerana mereka mahu menjalankan semakan berkaitan kebolehlaksanaan serta mendapatkan kelulusan lembaga pemegang amanah adalah sebenarnya samaran dan muslihat untuk merundingkan semula terma-terma perjanjian. Tindakan Tekun itu bermaksud tindakan mengingkari perjanjian dan tindakan Tekun sebelum pengeluaran notis penamatan Plenitude bermaksud Tekun sama sekali enggan melaksanakan kewajipannya bawah perjanjian tersebut. Tindakan penggantungan sistem MG secara sebelah pihak adalah pelanggaran perjanjian tersebut. Penamatan oleh Tekun menurut arahan yang diberi oleh Kerajaan tidak berkesan kerana perjanjian itu telah pun ditamatkan oleh Plenitude. Tiada keterangan bahawa Plenitude mempunyai apa-apa pengetahuan tentang ketidakaturan pengurusan dalaman Tekun termasuk polisi bahawa apa-apa transaksi melebihi nilai RM500,000 memerlukan kelulusan lembaga pemegang amanah.

(5) Apabila terdapat klausa untuk ganti rugi, mahkamah mesti menilai kemunasabahan klausa yang dipersoalkan. Apa yang 'munasabah' mesti pada asasnya berdasarkan keterangan yang ada. Klausa 11.2 perjanjian jelas memperuntukkan bahawa jika perjanjian ditamatkan secara sebelah pihak oleh salah satu pihak semasa perjanjian berkuat kuasa, pihak yang salah perlu membayar pampasan kepada pihak satu lagi yang membayangkan kerugian peluang pendapatan untuk tempoh perjanjian yang masih belum tamat. Mahkamah mesti menilai klausa tersebut terhadap keterangan yang ada untuk menentukan sama ada jumlah yang dikira berdasarkan klausa tersebut berpadanan dengan kepentingan sah pihak yang tidak bersalah dalam pelaksanaan kewajipan asas. Jika jumlah yang dinyatakan dalam klausa itu besar, maka klausa tersebut mesti dianggap sebagai 'klausa penalti' yang tidak munasabah dan oleh itu, batal.

(6) Pihak yang menuntut ganti rugi, khas atau am, memikul beban membuktikan fakta dan kuantum kerugian yang dialami. Award ganti rugi bersifat memampas, dan oleh itu, beban membuktikan ganti rugi atau kerugian terletak pada plaintif. Formula bawah kl. 11.2 memerlukan pengiraan kehilangan peluang Plenitude yang didefinisi sebagai hak pihak menurut kl. 5.1. Sebagai pihak yang mengalami kerugian atau kehilangan akibat pelanggaran oleh Tekun, Plenitude berhak untuk dipampas. Walau bagaimanapun, tiada keterangan kerugian, sama ada secara lisan atau dokumentar, dibuktikan oleh Plenitude untuk menjustifikasi tuntutan ganti rugi berdasarkan formula yang disetujui itu. Selanjutnya, bawah kl. 11.2 perjanjian, hak tersebut hanya boleh dibangkitkan jika perjanjian berjalan untuk 12 bulan. Dalam kes ini, perjanjian ditamatkan oleh Plenitude kurang dari 12 bulan dan oleh itu, formula yang dinyatakan bawah kl. 11.2 tidak boleh dibangkitkan.

(7) Jika satu-satu jumlah dinyatakan dalam kontrak adalah besar dan tidak munasabah untuk dibayar jika berlaku pelanggaran, itu mesti dianggap sebagai penalti dan oleh itu, batal bawah s. 75 Akta. Klausa 11.2 adalah klausa penalti bawah s. 75 Akta. Hakim Mahkamah Tinggi sepatutnya menolak jumlah yang dinyatakan kerana tiada keterangan dikemukakan untuk menyokong jumlah tersebut atau mana-mana jumlah yang akan diputuskan mahkamah. HMT tersalah arah apabila memerintahkan ganti rugi ditaksir setelah memutuskan Plenitude gagal mengemukakan keterangan yang mencukupi untuk mengekalkan kesnya untuk kuantum ganti rugi. Dalam hal keadaan tersebut, walaupun Tekun bertanggungan untuk kerugian yang dialami Plenitude, oleh sebab Plenitude gagal membuktikan kerugian, mahkamah hanya membenarkan ganti rugi nominal.

Case(s) referred to:

Cavendish Square Holding BV v. Talal El Makdessi [2015] UKSC 67 ***(refd)***

Clydebank Engineering Company v. Yzquierdo y Castaneda (Don Jose Ramos) [1905] AC 6 ***(refd)***

Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(foll)***

Fateh Chand v. Balkishen Das [1964] 1 SCR 515 ***(refd)***

Hadley v. Baxendale [1854] 9 Exch 341 ***(refd)***

Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2009] 4 CLJ 569 FC ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Ling Peek Hoe & Anor v. Ding Siew Ching & Another Appeal [2017] 7 CLJ 641 FC ***(refd)***

Sarwan Kumar v. Madan Lal Aggrawal AIR 2003 SC 1475 ***(refd)***

Scandinavian Trading Tanker Co AB v. Flota Petrolera Ecuatoriana (The "Scaptrade") [1983] 2 AC 694 ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(foll)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***

A *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC* ***(refd)***

Veheng Global Traders Sdn Bhd v. AmGeneral Insurance Bhd & Anor And Another Appeal [2019] 7 CLJ 715 FC ***(refd)***

Wearne Brothers (M) Ltd v. Jackson [1966] 1 LNS 210 HC ***(refd)***

B **Legislation referred to:**

Contracts Act 1950, s. 75

For the appellant - Mubashir Mansor & Raja Nadhil Aqran Raja Aminollah; M/s Skrine
For the respondent - Wong Yee Chue, Jean Aw Yuen Hui & Wan Hsiek Eam; M/s YC Wong

C *[Editor's note: For the Court of Appeal judgment, please see Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Other Appeals [2018] 8 CLJ 686 (affirmed in part).]*

Reported by S Barathi

JUDGMENT

D **Hasnah Mohammed Hashim FCJ:**

Introduction

[1] The appeals concern the application of s. 75 of the Contracts Act 1950 (CA) in relation to the assessment of damages arising out of a termination of
E an agreement. There were two appeals before us, namely Civil Appeal No. 02(f)-90-10-2018(W) and Civil Appeal No. 02(f)-92-10-2018(W) both appeals by Tekun Nasional, the defendant in the High Court suit. For ease of reference the Civil Appeal No. 02(f)-90-10-2018(W) will be referred to as the 'MG appeal' and Civil Appeal No. 02(f)-92-10-2018(W) is the 'SI
F appeal'. In this judgment, Tekun Nasional will be referred to as 'Tekun' and Plenitude Drive (M) Sdn Bhd will be referred as 'Plenitude'.

Preliminary Objection

[2] At the commencement of the hearing of the appeals, learned counsel for Plenitude raised a preliminary objection with regards to the appeals
G before us. Learned counsel contended that the notice of appeal ('NOA') filed by Tekun is confusing as there is an alternative prayer. The NOA reads as follows:

> (1) The whole of the decision in the MG appeal and the SI appeal that
H the alleged contract between Tekun and the respondent ("PDSB") dated 18.9.2014 ("the contract") was valid and enforceable instead illegal and void; and
>
> (2) Alternatively, such part of the decision in the MG appeal and the SI appeal which affirmed the decision of the High Court judgment dated 15.11.2016 that Tekun shall pay PDSB that general damages to be
I assessed in Civil Suit. No. 22NCvC-382-07-2015 for breach of the contract, and the remission of the case to the High Court for the said assessment.

[3] Learned counsel for Plenitude impressed upon us that the alternative prayer in the NOA that is, for damages to be assessed has no nexus between the issue as stated in the NOA and the question that was allowed. Both the High Court and the Court of Appeal did not decide on the agreement involving the SI. The appeal by Tekun is only in relation to the MG. If the NOA remain as it is, Plenitude would have to argue on all the issues related to the claim when the questions for this court are centered on the assessment of damages, and not on the validity of the agreement. Furthermore, both the High Court and the Court of Appeal had concluded that the agreement dated 18 September 2014 was valid and enforceable and not illegal or void. The decision was made only in the MG suit. The proposed question on illegality was not allowed by the Federal Court. Learned counsel further argued that even though illegality can be raised at any time, the refusal by the Federal Court to allow the question on illegality has rendered this issue *res judicata*.

[4] In relation to para. 2 of the NOA, Tekun appealed against the decision in the MG appeal and the SI appeal. Learned counsel further argued that if that is the position taken by Tekun in this appeal before this court, then Plenitude will be seriously prejudiced as it would not be able to resist the appeal effectively without knowing against which part of the decision Tekun is appealing. There is effectively no appeal before this court against the Court of Appeal's decision in the Plenitude's appeal. Hence, the NOA is not only confusing but also misleading. Learned counsel for Plenitude moved this court to strike out both the appeals.

[5] Learned counsel for Tekun conceded and agreed to amend the NOA by deleting para. (1) and amending para. (2) by deleting the word "Alternatively" as follows:

> Such part only of the decision in the MG appeal which affirmed the High Court judgment dated 15.11.2016 that Tekun shall pay to PDSB general damages to be assessed in Civil Suit No. 22NCVC-382-07-2015 for breach of the contract, and the remission of the case to the High Court for the said assessment.

[6] With the amendments to the NOA as proposed by learned counsel, the SI Appeal was struck out. The amended NOA only relates to the order of assessment of general damages by the High Court in relation to the MG appeal.

[7] In granting leave, the Federal Court further ordered that both the defendant's appeals be consolidated and that there should only be one notice of appeal. This court granted leave to appeal, the following questions of law:

Question 1

Whether the High Court, in a trial on both liability and damages for breach of contract, has any residual jurisdiction to order for assessment of damages, after it has delivered judgment and held that the plaintiff has failed to prove the damages at the trial.

A **Question 2**

1. Whether a litigant who wishes to rely on s. 75 of the Contracts Act 1950 must raise it in the pleadings.

2. Whether a litigant who wishes to rely on s. 75 of the Contracts Act
B 1950 to defeat a claim based on a contractual provision fixing a formula for computation of the amount of damages must prove that the provision is a penalty.

The Material Background Facts

C **[8]** Tekun is an agency under the Ministry of Entrepreneur Development established on 9 November 1998 to provide simple and quick financing facilities to Bumiputeras in order to kick-start and further expand their businesses. Tekun disburses loans and collects repayment of the loan granted. Plenitude had proposed to Tekun to develop an efficient information infrastructure system which will upgrade the loan repayment facility by
D introducing the MG and SI system. Under the MG system, Tekun's collections of loan repayment will be managed and updated real time by a portable terminal linked to Tekun's database. The MG system will be used for collection of repayment from Tekun's borrowers by using an ATM card *via* e-debit transactions. When payments are made by cash or cheque, the
E MG system would be able to record the transaction and key in the amount transacted together with the relevant data. The data of the loan repayment would be captured by the MG system and automatically uploaded to Tekun's system immediately. A receipt will then be electronically generated from the MG, followed by an SMS to the borrower confirming the transaction. The
F SI system is a separate software system integrating with Maybank's system to collect monthly repayments by direct debit from the accounts of the defendant's borrowers.

[9] By a letter of award dated 29 August 2014, Tekun awarded the project described as the "Implementation and Outcome Management System Tekun
G Nasional" to Plenitude. The implementation was to be carried out in phases, the first phase being the Tekun MG system repayment collection system. An agreement was executed between the parties on 18 September 2014 setting out the terms and conditions agreed upon:

H WHEREAS:

A. Pursuant to a Letter of Award dated 29th August 2014 (Ref: TEKUN/JBBK/10/08 (24)), PDSB has been awarded by TEKUN the following Project:

"Implementation & Outcome Management System Tekun Nasional"

I (hereinafter referred to as **"the System"**).

B. Implementation of the System will be carried out in phases and the first phase of the System consists of application of **TEKUN Mobile Gadget Repayment Collection System** (hereinafter referred to as the "the Project")

C. **TEKUN** is desirous of appointing **PDSB** to undertake the Project and PDSB is desirous of accepting such appointment upon and subject to the terms and conditions herein contained.

[10] The then CEO cum managing director of Tekun signed the agreement on behalf of Tekun. Apparently the agreement was signed after a committee in Tekun consisting of five high ranking officers had not only scrutinised but had finalised the terms and conditions of the agreement. Under the agreement, Plenitude agreed to design, develop and supply all hardware, software and technology which will enable Tekun's officers to use the MG system to collect repayment of loans more efficiently. Plenitude is to supply at a minimum number of 500 mobile gadgets for Tekun's use throughout Malaysia as well as providing all relevant technical services:

4. UNDERTAKINGS OF PDSB

4.1 In connection with the Project, PDSB *via* its subsidiaries, appointed agents or its representatives shall provide TEKUN with the following services:

(a) deploy a minimum number of 500 Mobile Gadgets;

(b) shall enhance the technology utilised by the Mobile Gadget every five (5) yeas at no cost to TEKUN;

(c) develop and implement systems to capture the data of the loan repayments and upload these transactions to TEKUN systems on daily basis;

(d) supply all consumables (paper rolls) of the mobile gadgets as per TEKUN's requirements;

(e) provide telephone call(s) service during office hour to receive calls from TEKUN's Officer(s) and to attend to any technical problems relating to mobile gadgets transaction conducted by TEKUN's Officer(s). The repair process by the PDSB shall take not less than six (6) hours including the replacement of the mobile gadgets within the stipulated hours and PDSB shall have adequate spare mobile gadgets in case the mobile gadgets need replacement so as to ensure the mobile gadgets are in working condition on the next working day. Any request from TEKUN's Officer(s) received after 3 pm of normal office hour will be considered as the following day request;

(f) allow the Mobile Gadgets to dial in to the nodes of PDSB's nationwide data network nearest to the TEKUN's Officer for the transmission of the transactions to PDSB;

(g) facilitate payments of the e-Debit processing fees (including the Interchange Fees) on behalf of TEKUN (the authorisation of which is hereby given by TEKUN to PDSB under this Agreement);

(h) pay to TEKUN's relevant bank accounts total TEKUN's Fee and to TEKUN's total Net Loan Repayment Amount excluding fee of TEKUN and PDSB comprehending all Card Transactions made by the Customers through their e-Debit ATM Card on any given day by minimum transaction day plus five (T+5). This day(s) implies the working days of banks in Kuala Lumpur;

(i) save for the cash and cheque transactions PDSB shall invoice to TEKUN an amount of Ringgit Malaysia One and Fifty Cents Only (RM1.50) for each transaction before 25th day each month;

(j) PDSB shall pay to TEKUN the TEKUN's Entitlement as per clause 5.1 therein of Ringgit Malaysia Twenty Cents Only (RM0.20) per cash, e-debit and/or cheque transactions and such TEKUN's Entitlement shall be reimbursed to TEKUN within the third week of every month, whereas TEKUN shall invoice PDSB the TEKUN's Entitlement for cash, e-debit and/or cheque transactions within the second corresponding week of every month.

[11] The MG system was designed based on zero investment concept where all capital expenditures were to be borne by Plenitude. Pursuant to cl. 5 of the agreement, Plenitude will be entitled to receive a sum of RM1.50 for every loan repayment transaction:

5. CONSIDERATION

5.1 In consideration of PDSB bearing all costs and expenses in the carrying-out and implementation of the Project under this Agreement, PDSB shall be entitled to **Ringgit Malaysia One and Fifty Cents Only (RM1.50)** per transaction either successful e-debit, cash and/or cheque transaction(s) **("PDSB's Entitlement")** of the amount collected from The Borrower/Payee(s) under the Project (hereinafter referred to as **"Total Infrastructure Fee"**). **TEKUN** shall be entitled to receive Ringgit Malaysia Twenty Cents Only (RM0.20) per transaction from PDSB's Entitlement either cash, e-debit and cheque transaction(s) **("TEKUN's Entitlement")** of the Total Infrastructure Fee.

5.2 The Parties agree that the Total Infrastructure Fee is a fixed amount of **Ringgit Malaysia One and Fifty Cents Only (RM1.50)** per transaction as agreed to by **TEKUN** in respect of the Project.

[12] Plenitude completed the development of the MG system. A user acceptance test ('UAT') was conducted on 3 November 2014. Tekun, approved and accepted the MG system. On 26 November 2014, a total of 28 MG was delivered to Tekun's branches located in the Federal Territory.

The remaining 472 MG plus another 181 additional MG had been checked and verified by Tekun and were ready to be delivered to all its branches throughout the country.

[13] However, Tekun refused to collect the remaining mobile gadgets, and instead on 20 March 2015 ordered all of its officers in the Federal Territory to stop using the MG, failed to pay invoices issued by Plenitude, refused to continue with the MG system and blocked Plenitude's access to its database and system.

[14] Aggrieved with Tekun's decision not to proceed with the MG system, Plenitude issued notices to Tekun as required under cl. 10.1 of the agreement for Tekun to rectify the breach within 30 days. At a meeting on 17 April 2015, Tekun notified Plenitude of its intention to renegotiate the terms of the agreement. Tekun did not take any steps to rectify its breach. Upon the expiry of the 30 days' notice, Plenitude through its solicitors issued a notice dated 27 April 2015 to terminate the agreement and demanded the sum of RM29,829,132.40 as damages. The sum of RM29,829,132.40 as damages according to Plenitude is computed based on a formula as provided under cl. 11.2 of the agreement.

[15] Plenitude filed two suits against Tekun for breach and the wrongful repudiation of the agreement by Tekun, one suit claiming RM29,829,132.40 and other reliefs including a claim for general damages for breach of contract and aggravated damages; the other suit is a claim for RM612,000 for installing and commissioning the MG system. It is Plenitude's case that it had delivered 28 mobile gadgets to Tekun. Despite having fulfilled its obligation under the agreement, Tekun, refused and failed to give any instructions or consent to Plenitude to complete the delivery of the remaining 472 mobile gadgets as provided under the agreement. Instead Tekun directed all its officers to stop using the mobile gadgets and refused to continue with the mobile gadget project without providing any reasons for doing so.

[16] With regards to the SI system, Plenitude contended that the quotation of RM612,000 to complete the project was accepted and agreed to by Tekun. The SI system was tested and after being accepted and approved, the project went 'live' on 24 December 2014. Tekun failed to make payment of the quoted amount. Tekun, on the other hand contended that it was directed by the Ministry to terminate the agreement and that the project was being investigated by the Malaysian Anti-Corruption Commission. It was also alleged that the Managing Director/Chief Executive Officer of Tekun purportedly was not authorised to enter into the agreement as the amount involved was in excess of RM500,000 and as such the approval of the board of trustees must be procured before entering into any agreement.

[17] As for the SI system, it was argued that it is not liable to pay as the agreement only concerns development of the MG system, the SI system is not provided for under the agreement and that the SI system was not part of the zero investment scheme.

The High Court

[18] Before considering the reasoning of the Court of Appeal, it is appropriate to consider the reasons of the High Court Judge. At the High Court, the two suits were consolidated and tried together. After the full trial, the High Court Judge found that there was strong credible evidence of acquiescence by Tekun that there was a valid contract for the MG system project. Plenitude was not entitled to claim the specific contract sum in light of s. 75 CA however, is entitled to general damages to be assessed. In respect of the SI system, Tekun is estopped from reneging on their obligation to pay under the invoice and judgment was entered against Tekun the sum of RM612,000. The High Court in suit 618 ordered Tekun to pay a sum of RM612,000 with interest to Plenitude.

[19] In suit 382, the High Court allowed Plenitude's claim on liability and dismissed the stipulated damages RM29,829,132.40. The High Court held that the claim of RM29,829,132.40 was a claim for special damages based on the formula under cl. 11.2 of the agreement. The High Court ordered damages to be assessed. The learned judge, however, reminded himself that the trial before him was conducted on the basis of liability and quantum. The learned judge did not consider the trial to be bifurcated or for the case to be dealt with on liability first and damages to be assessed at a later stage of the proceedings, depending on the outcome of the issue of liability. He summarised this conclusion in para. 157 of his grounds of judgment (GOJ):

> For my part, I am of the view that as the trial was still afoot before me and a decision had not been pronounced, I could exercise my residual discretion, as a matter of procedural fairness and justice to order damages to be assessed, *albeit* that the plaintiff was not entitled to claim the specific contract sum in light of section 75 Contracts Act 1950. As I said, whether the route which I had taken to order that damages be assessed in these circumstances, is one which will be approved by the Court of Appeal, remains to be seen.

The Court Of Appeal

[20] Both Plenitude and Tekun appealed against the decisions to the High Court. Before the Court of Appeal, the issues that arose were:

(i) whether the agreement was void for illegality;

(ii) whether liability had been established against Tekun; and

(iii) whether Plenitude was entitled to the sums claimed for the MG system and the SI system.

[21] In relation to the SI Appeal, the Court of Appeal affirmed the findings of the learned trial judge and in relation to the MG Appeal with regard to the findings of liability, the Court of Appeal found that there was no appealable error of law or fact in the findings of the learned High Court

Judge. Tekun's unilateral act of suspending the MG system amounts to a breach of the agreement. It was found that the learned trial judge had considered the contemporaneous documents that were adduced and the whole circumstances and probabilities of the case. The Court of Appeal agreed that the development of the SI system was completed and UAT was successfully conducted and the system was accepted by Tekun. The SI system was uploaded onto Tekun's server and went 'live' on 24 December 2014. The High Court Judge's finding on liability of both mobile gadget project and the standing instruction system was affirmed by the Court of Appeal.

[22] On damages, the Court of Appeal disagreed with the High Court that the claim of RM29,829,132.40 was a claim for damages. The Court of Appeal found the amount claimed by Plenitude is damages quantified in accordance to the agreed formula as provided under cl. 11.2 of the agreement. The Court of Appeal, however, held it to be a penalty and not claimable under s. 75 CA. It was also found by the Court of Appeal that it is settled law that if a sum is named in a contract as the amount to be paid in case of a breach, is unreasonable, it must be treated as a penalty and therefore void under s. 75 CA. Having found so, the Court of Appeal struck it down. The Court of Appeal agreed and held that the High Court Judge was correct to disallow Plenitude's claim for the said amount but agreed that nevertheless Plenitude is entitled to be compensated for any loss or damage resulting from the breach including its loss of earnings and profits, though it could not rely on cl. 11.2 to stake its claim. The Court of Appeal then dismissed the appeals and ordered the matter to be remitted to the High Court for assessment of damages, in order to ensure that Plenitude is fairly and reasonably compensated for the Tekun's conduct and breach.

[23] The sum total of the above finding is reflected in the judgment of the Court of Appeal where Tengku Maimun Tuan Mat JCA (as Her Ladyship then was) elucidated:

> [92] Whilst we find that the learned judge was correct on the law pertaining to damages, we disagree with the learned judge that the claim of RM29,829.132.40 is an item of special damages. In our view, it is general damages quantified as per cl. 11.2 upon breach. Clause 11.2 appears to us to be a penalty under s. 75 of the Contracts Act because it stipulates and specifies the sum as being payable upon breach. It is settled law that if a sum is named in a contract as the amount to be paid in case of breach, it is to be treated as a penalty and therefore void under s. 75 (see *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569). As cl. 11.2 contravenes s. 75 of the Contracts Act, we are bound to strike it down under *Selvakumar* and *Johor Coastal*. It follows that the learned judge was correct to disallow the plaintiff's claim for RM29,829,132.40.

A [93] That however was not the end of the matter. Breach of contract may give rise to damages for loss of profit pursuant to s. 74 of the Contracts Act. In our view, a construction of the contract as a whole discloses that cl. 6.3 is part of the clause dealing with consideration or price as agreed between the parties. This is to be differentiated from cl. 11.2 which is a provision for compensation on default or breach, which we found to be
B a penalty. Therefore in assessing damages, cl. 6.3 is not caught by s. 75 of the Contracts Act.

[24] We heard this appeal on 11 August 2020. By this time, there was a new development in the law in relation to s. 75 CA. This court had on 21 November 2018 decided on this issue in *Cubic Electronics Sdn Bhd (In*
C *Liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723; [2019] 6 MLJ 15 (FC).

Application Of *Cubic*

[25] Before I proceed to discuss on the issue of damages, I find it is
D necessary to address whether *Cubic* (*supra*) applies to this appeal before us. The Federal Court in *Cubic* (*supra*) through the leading speech for the majority delivered by Richard Malanjum CJ (Sabah & Sarawak) (as he was then) articulately explained that the onus lies on the party seeking to enforce a damages clause under the said section to adduce evidence in support. Section
E 75 CA allows reasonable compensation to be awarded subject always to the defendant proving the unreasonableness of the clause and the sum stated therein. In the event there is a dispute as to what constitutes reasonable damages to be paid, the burden of proof falls on the defendant to show that the damages clause including the sum stated under the contract is
F unreasonable.

[26] *Cubic* (*supra*) was decided by this court on 21 November 2018, two years after the High Court's decision of this case on 15 November 2016. The Court of Appeal considered and decided the appeal on 24 April 2018 before *Cubic* (*supra*). Hence, the Court of Appeal was still relying on the earlier legal
G position on the application of s. 75 CA.

[27] Learned counsel for Plenitude submitted that in *Cubic* (*supra*) the onus lies on the party seeking to enforce a clause under s. 75 CA to adduce evidence that there was a breach of contract and, upon a breach the sum that must be paid by the defaulting party is as stipulated specifically by the terms
H of the contract. The aggrieved party will be entitled to receive a sum not exceeding the sum stipulated in the contract irrespective of whether actual damage or loss is proven. Learned counsel further argued that this court must consider and apply the principles enunciated in *Cubic* (*supra*) where the burden falls on Tekun to show the unreasonableness of cl. 11.2 or to
I demonstrate based on evidence what would be reasonable compensation. Tekun failed to discharge that burden and failed to prove that cl. 11.2 and the sum stipulated is not only exorbitant but unconscionable. Plenitude is, therefore entitled to the RM29,829,132.40 as agreed.

[28] In response to the submission of learned counsel for Plenitude, learned counsel for Tekun argued that *Cubic* (*supra*) does not and cannot apply retrospectively as it would create injustice. Tekun's defence in both the High Court and Court of Appeal was based on the principles expounded in *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374. If the principles in *Cubic* (*supra*) were to apply, it would mean that the burden is on Tekun to prove the unreasonableness of cl. 11.2. Clearly, this was not the basis the case was argued in the High Court or in the Court of Appeal as *Cubic* (*supra*) was not even decided when the matter was before the courts below. The law on the respective burdens of proof of the parties at that time during the trial as well as the appeal at the Court of Appeal in respect of s. 75 CA are as enunciated in *Selva Kumar* (*supra*) and *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569.

[29] The law on retrospectivity arose in relation to *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1, Richard Malanjum CJ (Sabah and Sarawak) (as he then was) delivered the decision of this court departed from the earlier legal position and held that in a civil claim, when fraud is alleged, the civil standard of proof is on the balance of probabilities. In the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities. Hence, post-*Sinnaiyah* (*supra*) the standard of proof for fraud in a civil proceeding is on a balance of probabilities.

[30] The issue on the retrospective application of a decision of the Federal Court case was discussed in the Federal Court decision of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697. In that case, it was held by the Federal Court that at the material time of the decision in the court below, the standard of proof for fraud in civil proceedings was beyond reasonable doubt.

[31] Therefore, *Sinnaiyah* (*supra*) could not apply in the later decision of this court in *Letchumanan* (*supra*) as the case was filed in 2010 and decided by the trial court in 2013 before the decision in *Sinnaiyah* (*supra*). The Federal Court held that the Court of Appeal had seriously misdirected itself in requiring proof of forgery on the standard of beyond reasonable doubt. Jeffrey Tan FCJ in *Letchumanan* (*supra*) clarified the prospective overruling of law in *Sinnaiyah* (*supra*) as follows:

> [88] … There was no departure in *Sinnaiyah* from the common law position when the court said 'we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims'. *The court merely underscored the retrospective and prospective effect of its decision, to apply to that appeal and to future cases, to cases as yet not filed and trials or appeals which have yet to be finally determined, but not to past cases which have reached*

A *a terminal end. The ruling in Sinnaiyah was not in the prospective only form. Sinnaiyah* applies to all cases that have not been finally determined, including all pending appeals, except that in the instant appeal, it does not matter. (emphasis added)

[32] Thus, for a decision to be binding retrospectively, the case must still B be at the trial stage to enable the parties to prepare and argue their case, be it a plaintiff or defendant, based on the burden of proof applicable at that material time.

[33] Likewise in *Ling Peek Hoe & Anor v. Ding Siew Ching & Another Appeal* [2017] 7 CLJ 641 the Federal Court explained that the rationale on C applicability of the doctrine of prospective overruling was logical and sound. The Federal Court referred to the Indian case of *Sarwan Kumar v. Madan Lal Aggrawal* AIR 2003 SC 1475 at p. 1481:

.. Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to D cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. Invocation of doctrine of "prospective overruling" is left to the discretion of the Court to mould with the justice of the cause or the matter before the Court.

E **[34]** The emphasis is on future cases and it did not affect cases that had attained finality which could only confine to cases that had already exhausted their appeal process within the court system. This is expressed by the Federal Court in *Ling Peek Hoe* (*supra*):

[28] Thus, 'the law declared by the court applies to the cases arising in F future only and its applicability to cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence'. The emphasis is on future cases and it does not affect cases that have attained finality. In fact, a similar sentiment was expressed by our then Supreme Court in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311 when in applying the G doctrine of prospective overruling justified it so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under the section prior to the date of our judgment in this matter would remain undisturbed and not be affected.

H [29] And although the word finality was not further explained in *Sarwan Kumar* (*supra*), we hold the view that it could only mean those cases that have already exhausted their appeal process within the court system.

[30] Accordingly, within our jurisdiction, we are therefore of the view that the law as declared by this court and made subject to the doctrine of prospective overruling applies to all pending cases and all those cases still I under appeals within our court system. As such we cannot subscribe to the argument that future cases should mean only those cases yet to be filed with the court.

[35] Pre-*Cubic* in applying s. 75 CA, the burden of proof lies on the plaintiff to show that the damages as stipulated in the contract is a reasonable compensation by reference to the loss sustained by the plaintiff in consequence of the defendant's breach. In determining the reasonableness of the amount, the court must give due regards to the evidence of actual loss adduced by the plaintiff. This burden of proof upon the plaintiff as the claimant is consistent with the classic juridical principle stating that "he who asserts must prove".

[36] Ramly Ali FCJ delivering the unanimous decision of the Federal Court in *Veheng Global Traders Sdn Bhd v. AmGeneral Insurance Bhd* [2019] 7 CLJ 715; [2019] 4 MLJ 581 followed *Ling Peek Hoe* (*supra*) and *Letchumanan* (*supra*). His Lordship explained with great clarity as follows:

> [16] Apparently the effect of 'prospective overruling' by an apex court which applies to 'future cases' has been clarified and extended in *Ling Peek Hoe* to include its applicability to all cases that have not been finally determined as well as cases pending appeal within a court system. This settled position has been adopted and followed in the cases of *Dato' Prem Krishna Sahgal v. Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693; and *Maheswari a/p Eliathamby & Anor v. Koperasi Serbaguna Kebangsaan Bhd & Ors* [2019] 1 MLJ 440; [2018] MLRAU 1. As clearly said by Jeffrey Tan FCJ in *Letchumanan Chettiar Alagappan* 'that is the common law position. There was no departure in *Sinnaiyah* from the common law position'. The ruling in *Sinnayiah* is not to be applied to past cases which have attained finality upon reaching their terminal end.
>
> …
>
> [19] Based on the above reasoning, we will answer question (i) in the affirmative ie that the standard of proof on a balance of probabilities for fraud cases in civil proceedings where fraud is alleged as laid down in *Sinnaiyah* is applicable to trials concluded pre-*Sinnaiyah* but judgment thereof was pending and delivered post-*Sinnaiyah*. That is the law applicable to the present case.

[37] Learned counsel for Plenitude relied on the case *Cubic* (*supra*) and submitted that there is no necessity for the plaintiff to prove actual loss or damages as the innocent party of the breach it seeks to enforce a damages clause. *Cubic* (*supra*) introduced a new burden, shifting the onus to the defendant, in this case, Tekun to prove that the damages claimed by Plenitude is unreasonable and unconscionable. This, according to learned counsel for Plenitude, Tekun failed to do. Learned counsel for Tekun in response argued that Tekun had presented and argued its case in the High Court based on burden of proof applicable at the material time where Plenitude bears the onus to prove the actual loss.

[38] If *Cubic* (*supra*) is applicable, Tekun must adduce evidence to prove that the damages claimed by Plenitude is unreasonable. The onus of proof in relation to s. 75 CA at that material time lies on Plenitude, following *Selva Kumar* (*supra*) and *Johor Coastal* (*supra*). *Cubic* (*supra*) should not be applicable retrospectively to cases where full trial has completed and decided by the court of first instance. The Court of Appeal had decided based on the law applicable at that material time. In this case, the retrospectivity of *Cubic* (*supra*) will cause manifest injustice to Tekun. Therefore, it stands to reason that *Cubic* (*supra*) will only apply prospectively. That is, to cases where trials have not been completed.

[39] In its statement of claim, Plenitude claimed the sum of RM29,829,132.40 as well as general damages and aggravated damages. Learned counsel for Tekun had impressed upon us that the trial in the High Court was not bifurcated; the High Court was to decide on liability and damages. The evidence of damages as adduced by Plenitude at the trial was purely mathematical with no supporting evidence such as its operating expenses. The basis of Plenitude's claim is RM1.30 and at the time they filed the claim they had in fact sub-contracted part of the agreement.

[40] At the conclusion of the trial, the High Court found Tekun liable for breach of the agreement, but did not allow the specific amount of damages claimed by Plenitude. However, the High Court ordered that general damages to be assessed. The learned High Court Judge explained in his grounds of judgment "as the trial was still afoot before me and a decision had not been pronounced …" he could exercise his "… residual discretion, as a matter of procedural fairness and justice to order damages to be assessed ...".

[41] Although Tekun had no license to carry on the business of the payment system, the agreement was not illegal. Under the agreement, Plenitude agreed to develop the MG and SI system for Tekun for purposes of collection of loan repayment. Collecting payment from its customers had been the business of Tekun for a long time and it had the requisite approval from Bank Negara to do so. As such, Tekun was carrying on an approved business. The agreement with Plenitude was valid as it was to replace manual collection and therefore not an illegal business. The conduct of Tekun in unilaterally suspending the MG system allegedly because they wanted to conduct a review as to its feasibility as well as to obtain its board of trustees' approval was in fact a façade or cloak to re-negotiate the monetary terms of the agreement. The actions of Tekun tantamount to conduct which is repudiatory of the agreement and the conduct of Tekun before the issuance of the Plenitude's notice of termination was an absolute refusal by Tekun to perform their obligations under the agreement.

[42] The unilateral act of suspending the MG system amounted to a breach of the agreement. The termination by Tekun pursuant to the direction given by the Government was ineffective as the agreement had already been terminated by Plenitude. There was no evidence that Plenitude had any

knowledge of any irregularity in the internal management of Tekun including the policy that any transaction above the value of RM500,000 required the approval of the board of trustees. The High Court Judge was correct when he found no credible evidence that there was in existence such an internal process or procedure which required contracts with a monetary value in excess of RM500,000 to be approved by Tekun's board of trustees.

[43] Tekun initially expected the SI system to be part of the zero investment concept and did not object to the quotation of RM612,000. The invoice that was issued was duly acknowledged by the Tekun. The Court of Appeal concluded that the reasonable inference to be drawn from the established facts would be that Tekun had agreed to the quotation of RM612,000. The High Court Judge's decision on quantum of RM612,000 for the SI system was upheld by the Court of Appeal. In respect of the mobile gadget project, the learned judge ruled that the sum of RM29,829,132.40 claimed as a specific sum damages which must be strictly proven.

[44] Bearing in mind the applicable law on s. 75 CA pre-*Cubic* (*supra*), we now return to the central issue in this appeal. Clause 11.2 of the agreement stipulates as follows:

> 11.2 In the event that this Agreement is unilaterally terminated by either Party during the subsistence of this Agreement, the defaulting Party shall pay compensation to the other Party reflecting to that Party's Opportunity loss of income for the unexpired term of this Agreement. A Party's Opportunity loss shall be defined as the Party's Entitlement in accordance with clause 5.1 therein earned in the preceding twelve (12) months prior to the termination, multiplied by the unexpired term, measured in years of this Agreement. The illustrations of the Party's Opportunity loss of income shall be in the following table:

Party's Entitlement	X	Number of monthly transactions in the preceding twelve months prior to termination	X	"X" Years	=	Party's Opportunity loss

[45] Learned counsel for Tekun argued that the formula as stipulated under cl. 11.2 is in essence a penalty as the sum is exorbitant and as such irrecoverable. In response, learned counsel for Plenitude argued that cl. 11.2 is not a penalty clause as a result of the breach by Tekun, Plenitude is entitled to the minimum amount calculated as agreed by the parties.

[46] It was also pointed out that the agreement has not even gone beyond the twelve months as required in the formula and that cl. 11.2 is clearly a penalty clause as the final sum calculated based on the formula stipulated is not only exorbitant but unreasonable.

[47] Clause 11.2 of the agreement is explicitly clear. It provides that if the agreement is unilaterally terminated by either party during the subsistence of the agreement, the defaulting party shall pay compensation to the other party reflecting to that party's opportunity loss of income for the unexpired term of this agreement.

[48] The Court of Appeal had made the following observation:

> [92] Whilst we find that the learned judge was correct on the law pertaining to damages, we disagree with the learned judge that the claim of RM29,829.132.40 is an item of special damages. In our view, it is general damages quantified as per clause 11.2 upon breach. Clause 11.2 appears to us to be a penalty under section 75 of the Contracts Act because it stipulates and specifies the sum as being payable upon breach. It is settled law that if a sum is named in a contract as the amount to be paid in case of breach, it is to be treated as a penalty and therefore void under section 75 (see *Selvakumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 2 CLJ 374; *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569). As clause 11.2 contravenes section 75 of the Contracts Act, we are bound to strike it down under *Selvakumar* and *Johor Coastal*. It follows that the learned judge was correct to disallow the plaintiff's claim for RM29,829.132.40.

[49] The Court of Appeal found the method of calculation to be an inaccurate representation of the actual loss of profits.

[50] In *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177 the Federal Court recognised that an aggrieved party is entitled to damages for loss of profit. In *SPM Membrane* (*supra*) the claim for loss of profit was dismissed by the High Court but upheld by the Court of Appeal. The Federal Court did not approve the mode of calculation for the loss of profit and remitted the matter to the High Court for assessment of damages notwithstanding that the trial was not bifurcated. Her Ladyship, Zainun Ali FCJ reasoned:

> [118] However, we do not approve of the appellant's method of calculation for the loss of profit. In its pleadings the appellant claimed for over RM19m whilst in its written submissions the appellant claimed RM10,415,421.43 (and, incidentally, incorrectly added the word million behind the figure). Let it be said that such careless disregard for precision is less than satisfactory. Counsel for the appellant stated that this sum (and the formula used in arriving at that figure) was explained and had been proven at trial. Essentially it is based on the average of the commissions due to the appellant for the preceding 40 months which is then multiplied with the balance [of] 20 months. The accuracy of these figures were not challenged during trial ...

[119] This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on "commissions", that is to say receipts, is very different from a calculation based on "profits". To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonably incurred in the remaining 20 month period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved. However, contrary to the respondent's submission and the judgment of the trial judge, the mere fact that the formula was the appellant's own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula. The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court.

[120] Therefore, contrary to the respondent's submission, we do not think that proper consideration on quantum was allowed for at trial. There were no clear submissions made as to the expenses incurred and a very loose use of the words pendapatan and kutipan, which shed no light on the actual loss of profits. The respondent should also take the opportunity to submit on whether the formula is a proper representation of the loss of profits, that is to say whether or not there are any other factors that could reasonably have been expected to increase or reduce collections, and corresponding commissions, be it a significant reduction in remaining arrears or for any other reason. The challenge by the respondent exclusively on the basis that loss of profits was not expressly stated in cl. 8.5 was wholly inadequate.

...

[122]... We order that this claim be remitted to the High Court for assessment of damages, by a High Court Judge on the issue of quantum occasioned by a wrongful termination of the contract.

[51] The disputed contract in *SPM Membrane* (*supra*) did not have a clause to calculate damages or loss of profits in the event of a breach. Zainun Ali FCJ observed:

[119] … The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court.

[52] The Federal Court decided that since the contract was not validly terminated, the issue of quantum became relevant:

A [120] Therefore, contrary to the respondent's submission, we do not think that proper consideration on quantum was allowed for at trial. There were no clear submissions made as to the expenses incurred and a very loose use of the words pendapatan and kutipan, which shed no light on the actual loss of profits. The respondent should also take the opportunity to submit on whether the formula is a proper representation of the loss of
B profits, that is to say whether or not there are any other factors that could reasonably have been expected to increase or reduce the collections, and corresponding commissions, be it a significant reduction in remaining arrears or for any other reason. The challenge by the respondent exclusively on the basis that loss of profits was not expressly stated in cl. 8.5 was wholly inadequate.

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[53] Similar to the facts in this appeal before us, the trial was not bifurcated, the judge was to decide on liability and quantum, which he did. After considering the evidence adduced, he found Tekun liable but dismissed Plenitude's claim of RM29,829,132.40. It was dismissed on the basis there
D were no evidence adduced to support Plenitude's loss of RM29,829,132.40. Plenitude had presented its case for damages, the specified sum under cl. 11.2 and general damages without adducing any evidence, oral or documentary.

[54] When there is a clause on damages, the court must evaluate the reasonableness of the clause in question. What is "reasonable" must
E naturally be based on the available evidence. Abdul Aziz J in *Wearne Brothers (M) Ltd v. Jackson* [1966] 1 LNS 210; [1966] 2 MLJ 155 observed:

> The distinction between liquidated damages and penalty has ceased to be of great legal importance because the result in either case is that the court must determine reasonable compensation.

F **[55]** Section 75 CA provides:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have
G been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[56] The Federal Court in *Selva Kumar* (*supra*) sets out the guiding principle in construing the application of s. 75 CA. The court must evaluate the clause
H against the available evidence to ascertain whether the amount calculated based on the clause is proportionate to the legitimate interest of the innocent party in the performance of the primary obligation. If the amount stipulated in the clause is exorbitant, then the clause must be regarded as an unreasonable "penalty clause" and therefore void.

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[57] Peh Swee Chin FCJ in *Selva Kumar* (*supra*) explained that the plaintiff's reliance on a reasonable penalty clause must be supported with cogent evidence of actual loss. The Federal Court distinguished a contract where the court would find it difficult to assess damages with a contract where the court could assess damages with settled rules. On the true construction of s. 75 CA contains the phrase "whether or not actual damage or loss is proved to have been caused thereby", His Lordship had this to say:

> Where there is inherently any actual loss or damage from the evidence or nature of the claim, and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the Court to award such damages, despite the words "whether or not actual damage was proved to have been caused thereby" in s. 75 of the Contracts Act.

[58] His Lordship further reasoned:

> In the first place, such a literal construction would seem to be beyond the object of the section in question *viz*. the abolition of the distinction between a penalty and liquidated damages; secondly it will produce a most unreasonable result in that it will change the existing law which is that if a plaintiff seeks to recover damages for the actual damage caused, he ought to prove them, unless he is content with the symbolic award e.g. of nominal damages for any infraction of his rights under a contract. This even seems to be a rule of some antiquity.
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> We hold first, that the literal construction should not be strictly adhered to and the words in question should be given a restricted or limited construction though the language used in the words in question expresses really no circumscription of the area of operation.
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> …
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> Secondly, we therefore further hold that the words in question *viz.* "whether or not actual damage was proved to have been caused thereby", are limited or restricted to those cases where the Court would find it difficult to assess damages for the actual damage or loss as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.
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> Thirdly, therefore, we hold that the precise attributes of such contracts in which it is difficult for a Court to assess damages for the actual damage or loss are cases where there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently and such loss is not too remote, then the Court ought to award, not nominal damages, but instead, substantial damages not exceeding the sum so named in the contractual provision; a sum which is reasonable and fair according to the Court's of good sense and fair play.

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> Fourthly, we hold that in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the Court to award such damages despite the words in question.

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[59] The Federal Court in *Selva Kumar* (*supra*) approved the view adopted by the Supreme Court of India in *Fateh Chand v. Balkishen Das* [1964] 1 SCR 515. Peh Swee Chin FCJ observed as follows:

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> The ratio of the case seems to be that such 'reasonable compensation' must be proved according to the usual principles, and the court undertakes a consideration of the evidence adduced to see if there is any such proof or such evidence of such actual damage or loss. If there is no such evidence, there will be no award of such reasonable compensation.

[60] *Selva Kumar* (*supra*) recognises that where the court finds it difficult to D assess damages as there is no known measure of damages employable, the stipulated sum may be recoverable. Thus, any failure to prove such damages will result in the refusal of the court to award such damages. Ultimately, it is the court based on the evidence before it that determines what the reasonable compensation to be awarded.

E **[61]** In *Johor Coastal* (*supra*) the Federal Court had to determine whether that part of the decision in *Selva Kumar* (*supra*) which obliges a party having the benefit of a liquidated damages clause to prove its losses, notwithstanding the words in s. 75 CA 'whether or not actual damage or loss is proved to have been caused thereby', is correct; and whether or not parties entering into a F contract are entitled to contract out of the provisions of the said section.

[62] The majority in *Johor Coastal* (*supra*) concluded that actual damages or reasonable compensation must be proved in accordance with the principles set out in *Hadley v. Baxendale* [1854] 9 Exch. 341; [1843-1860] 9 Exch. 341 and that *Selva Kumar* (*supra*) is still good law. Following the principle in *Selva* G *Kumar* (*supra*), Arifin Zakaria FCJ (as his Lordship then was) delivering the majority decision of the Federal Court observed as follows:

> [32] Reverting to the first question posed to us, based on the authorities considered above, it is my view that the legal position may be summarised as follows:

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> > The appellant/vendor cannot recover or retain without proof by evidence of the loss or damage suffered as a result of the breach of the agreements. This is because s. 75 of the Act provides that in every case, the court must determine what is reasonable compensation, 'whether or not actual damage or loss is proved to have been caused thereby.'

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[33] And as was held in *Selva Kumar* actual damages or reasonable compensation must be proved in accordance with the principles set out in *Hadley v. Baxendale* (1854) 9 Exch 341.

[63] The United Kingdom Supreme Court's case of *Cavendish Square Holding BV v. Talal El Makdessi* [2015] UKSC 67 stated that the court may uphold an impugned clause in the absence of actual loss or damage by applying the concepts of legitimate interest and proportionality. Regardless of whether the damage is quantifiable or otherwise, it is incumbent upon the court to adopt a common sense approach by taking into account the legitimate interest an innocent party may have as well as the proportionality of a damages clause in determining what would be the reasonable compensation.

[64] The Federal Court in *Selva Kumar* (*supra*) recognises the category of cases where assessment of damages would be difficult when there is no measure of damages but there is evidence of real loss. In such cases, the party relying on the damages clause need not prove actual loss. The court should award damages not exceeding the sum stipulated in the contract but it must be reasonable and fair sum. Such a clause in a contract will provide certainty as to the recovery of damages when there is a breach by the other party.

[65] Thus, where a contract has a specific clause to calculate damages and/or loss of profits, if the plaintiff failed to prove his losses in order to receive the benefit of the clause it would necessarily mean that the plaintiff fail to prove his losses in his claim for general damages.

[66] It is trite law that the party claiming damages, special or general, bears the burden of proving the fact and quantum of damages suffered. Edgar Joseph Jr. FCJ, writing on behalf of the Federal Court, in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn. Bhd.* [1995] 1 CLJ 15 explained that in the assessment of damages for the breach of contract, the main objective is to place a party who has sustained a loss as a result of breach in the same situation as if the contract has been performed. In other words, the award for damages is compensatory in nature, and as such, the burden of proving damages or loss lies with plaintiff:

> Firstly, that part of the judgment of the Judge which provides that the Vendor shall pay to the purchaser damages to be assessed for wrongful termination of the Agreement with costs and that Tan Sri Khoo and the Vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having **to prove its loss** (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd.* 64, TLR 177, 178:

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> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the Court, saying:
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> This is what I have lost, I ask you to give me these damages. They have to prove it.

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> This *dictum* was referred to and applied by our Court of Appeal in *John v. Dharmaratnam* [1961] 1 LNS 35.
>
> And, in *Popular Industries Limited v. Eastern Garment Manufacturing Sdn. Bhd.* [1990] 2 CLJ Rep 635; [1990] 1 CLJ 133; [1989] 3 MLJ 360 …

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[67] The formula under cl. 11.2 requires calculation of Plenitude's opportunity loss which is defined as the party's entitlement in accordance with cl. 5.1. plenitude's entitlement is Ringgit Malaysia One and Fifty Cents Only (RM1.50) per transaction either successful e-debit, cash and/or cheque transaction of the amount collected from the borrower/payee(s) under the project. As a party who had suffered loss or damages as a result of the breach

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by Tekun, Plenitude would be entitled to be compensated. We have carefully perused through the appeal records and we do not find any evidence of damages, whether oral or documentary, proven by Plenitude to justify the claim for damages based on the agreed formula.

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[68] It is also our observation that the formula requires Plenitude to show its earnings preceding twelve months prior to the termination and the said figure must be factored in the calculation, multiply by the unexpired term and the duration of the agreement. Furthermore, under cl. 11.2 of the agreement, the right can only be invoked if the agreement runs for

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12 months. In this case, the agreement was terminated by Plenitude less than 12 months therefore under the circumstances the formula as stipulated under cl. 11.2 cannot be invoked.

[69] Before the High Court, Plenitude did not adduce any evidence that sum stipulated in cl. 11.2 is an accurate representation of its loss of profits so as to allow the court to determine whether or not their profit projection

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is highly speculative or grossly excessive to avoid unjust enrichment. On the facts and evidence, Plenitude failed to prove the sum claimed based on the formula. An award of damages must be proportionate to the loss suffered. Plenitude failed to prove its losses in order to receive the benefit of the cl. 11.2 and must also necessarily fail to prove its losses in its claim for

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general damages.

[70] If the sum stipulated in the agreement is extravagant and unconscionable in amount in comparison with the loss which could conceivably be proved to have followed from the breach then it must be

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regarded as a penalty (See: *Clydebank Engineering Company v. Yzquierdo y Castaneda (Don Jose Ramos)* [1905] AC 6). A genuine pre-estimate of damages,

on the other hand, would be anticipated damages calculated reflective of the loss that a party to an agreement may suffer as a consequence of the breach. Damages which are excessive or disproportionate are not a genuine pre-estimate of loss and may be held by the court to be a penalty and, therefore, unenforceable. Lord Diplock in *Scandinavian Trading Tanker Co AB v. Flota Petrolera Ecuatoriana (The "Scaptrade")* [1983] 2 AC 694 at p. 702:

> The classic form of penalty clause is one which provides that upon breach of a primary obligation under the contract a secondary obligation shall arise on the part of the party in breach to pay to the other party a sum of money which does not represent a genuine pre-estimate of any loss likely to be sustained by him as the result of the breach of primary obligation but is substantially in excess of that sum. The classic form of relief against such a penalty clause has been to refuse to give effect to it, but to award the common law measure of damages for the breach of primary obligation instead.

[71] We agree with the Court of Appeal that cl. 11.2 appears to be a penalty clause under s. 75 CA. It is settled law that if a sum is named in a contract is exorbitant and unreasonable for it to be paid in case of breach, it must be treated as a penalty and therefore void under s. 75 CA.

[72] The learned High Court Judge should have dismissed the stipulated amount since there was no evidence adduced to support the amount or any amount to be decided by the court. In our view, the learned High Court Judge had misdirected himself when he ordered damages to be assessed after having concluded that Plenitude's failure to adduce sufficient evidence to sustain its case on the quantum of damages. A perusal of the grounds of judgment of the Court of Appeal reveals that the Court of Appeal was of the view that the method of calculation formulated to be an inaccurate representation of the actual loss of profit especially so where evidence of Plenitude's earnings preceding twelve months prior to the termination were not adduced at all.

[73] In the circumstances, we hold that in the present appeal, a hearing of the assessment of damages would not only be a second bite of the cherry for Plenitude but also a waste of judicial time and resources. In view of Tekun's breach, we agree that, Tekun is liable for damages suffered by Plenitude. However, since Plenitude failed to prove damages, we allow nominal damages.

[74] For the reasons stated above, we are therefore compelled to allow the appeal in part with costs. We affirm the decision of the Court of Appeal on the issue of liability. However, we vary the order for damages to be assessed and substituted with an order that a sum of RM5,000 be awarded as nominal damages as the respondent had failed to prove damages.

[75] Since the law on s. 75 CA is now already decided by this court in *Cubic*, we do not find it necessary to answer the questions posed in this appeal.

[76] My learned sister, Rohana Yusuf PCA and my learned brother, Mohd Zawawi Salleh FCJ have sight of the judgment in draft, concur with the reasons given and the conclusions reached.

[77] In respect of costs, after considering submissions by counsels, we ordered costs of RM120,000 here and below subject to allocator.